Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

(3)

No. 93-1048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

J. WESLEY COOPER, MARGARET COOPER
and JAMES CARTER,
Petitioners

v.

THE ARMSTRONG RUBBER COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY BRIEF

STUART H. SMITH
Counsel of Record
LAW OFFICES OF BERNARD SACKS
200 Broadway #226
New Orleans, LA 70118
(504) 866-8200

JACK W. HARANG
1001 Howard Ave.
Suite 3710
New Orleans, LA 70118
Council for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1048

J. WESLEY COOPER, MARGARET COOPER
and JAMES CARTER,
Petitioners

v.

THE ARMSTRONG RUBBER COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY BRIEF

NOW INTO COURT, through undersigned counsel, comes your petitioners, who would respectfully suggest to this Honorable Court that respondent's brief in opposition to petitioner's Writ for Certiorari contains gross misstatements of fact and law the delineation of which would exceed the page limitations.

A review of the respondent's brief would establish conclusively that many of the underlying facts in this case are disputed. These disputed issues should have prevented the trial court from granting summary judgment. Every issue, from the extent of contamination resulting from the defendant's disposal activities to the reasonableness of the costs incurred by the petitioner are not undisputed. Respondent's brief contains arguments relating

more to a defense on the merits rather than one appropriate for a summary judgment. The respondent goes so far as to deliberately confuse arguments related to personal injury claims which are not an issue here. Respondent does not rebut petitioners expert testimony as it relates to petitioner's property damage claims under Mississippi law. For example, respondent seems to equate a finding by certain state officials that "no imminent threat to human health at the sites" is in some way applicable to the respondents liabilities for response costs and property damages.

Petitioner would like to reply to several blatent misstatements of fact present in the response to the Petition for Writ of Certiorari.

The defendant seems to allege that Mr. Carter gave it permission to dump hazardous waste on his property. See response page 2. Nothing could be further from the truth. The following testimony in the record establishes conclusively that no permission was given to Armstrong to deposit these wastes on the property.

Armstrong in its 30(b)(6) deposition admitted to the disposal of liquid hazardous wastes on Carter's property. Armstrong testified as to plaintiff Carter's property as follows:

> "Q. *Are you telling me that you found some containers out there containing liquid waste on his property?*
>
> A. *Yes.* . . .
>
> I want to back up and say something with regard to—Mr. Carter's statement. In all fairness to him, his request for checking erosion in the ravines, as I understand from him, would have been confined to tires or scrap rubber. *I think the presence of any drums or material of that type would have occurred inadvertently or however, but not at his request.*" (Emphasis Added) R-Vol. 8 pg. 3209-3211 (30(b)(6) deposition of Armstrong)

It was the adoption of the defendant's misstatements of facts and applicable law that apparently formed the basis of the Appellate Court's decision in this case. That decision conflicted with the District Court's opinion and also with the facts in the record. A full review of these disputed facts is mandated by the Constitution of the United States.

I. Response to Armstrong's reasons for denying the Writ.

This Honorable Court should at a very minimum grant the Writ of Certiorari, clarify the law regarding CERCLA, and remand this case to the District Court for full evaluation of the expert testimony in the record in light of *Daubert*.

As previously stated, the respondent's arguments on this point revolve solely around the personal injury claim aspect of this litigation and not the CERCLA or property damage claims. No direct response was made to the testimony of plaintiff's experts which were specifically delineated in footnotes one through four of the Petition for Writ of Certiorari. Apparently, the defendant does not deny that this expert testimony is reliable but only contends that, as it relates to the personal injury claims, it was properly excluded.

CERCLA allows a claimant to recover investigatory costs whether or not a removal or remedial action is necessitated. The defendant seems to contend that because a cleanup was not necessitated by the analytical results in the record which is disputed, that the plaintiff cannot recover investigatory costs incurred in determining whether or not a cleanup is necessary. Such an interpretation would do nothing but to defeat the purpose of CERCLA which is to promote investigation into past hazardous waste disposal practices.

The record establishes that Mr. Cooper spent in excess of $14,000.00 hiring back hoes and contractors to

remove drums as well as experts to perform analytical testing and interpretation of those results. Such investigatory costs certainly are recoverable under CERCLA. The defendant further confuses the difference between what is a hazordous waste and/or substance under CERCLA and what level of waste mandates a RCRA cleanup. The Resource Conservation and Recovery Act is not at issue here since it applies to facilities which are currently in operation. 42 USC § 6901-6902. All of the ARAR's as cited on page 17 of the respondents brief relate to RCRA and not CERCLA.

As previously stated, the Appellate Court did not review this record de novo, because if it had it could never have affirmed the District Court's decision. The record indisputably establishes that Armstrong dumped in excess of one million pounds of waste at these locations and that the plaintiff, in a good faith attempt to ascertain the extent of contamination incurred response costs. The District and Appellate Courts were able to deny the petitioner his constitutional rights to a jury trial by misapplication of the Federal Rules of Evidence. Such misapplication is a violation of petitioner's constitutional rights which mandates the granting of a writ in this case and a full review of the record in this Court and/or a remand for review of the facts under the appropriate legal guidelines.

Respectfully submitted,

STUART H. SMITH
Counsel of Record
LAW OFFICES OF BERNARD SACKS
New Orleans, LA 70118
200 Broadway #226
(504) 866-8200

JACK W. HARANG
1001 Howard Ave.
Suite 3710
New Orleans, LA 70118
Council for Petitioners